IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 75-1642

ARTHUR J. ABRAMS,

Petitioner,

vs.

THE COMMUNITY REDEVELOPMENT AGENCY OF THE CITY OF LOS ANGELES,

Respondent.

PETITIONER'S REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The "Response to Petition for Writ of Certiorari" (hereafter cited as "Resp.") filed by the Respondent presents the Court with the proverbial Exhibit A demonstrating the need for re-evaluation of the rule brought here for review. Surely, when briefing an issue of constitutional import before <u>this</u> Court, there ought to be <u>some</u> intellectually compelling requirement for an articulation of policy by those who

seek to defend this archaic injustice. Yet, one searches the Respondent's papers in vain for anything other than a sing-song repetition of the intellectually [and in this case morally] bankrupt proposition that the law is the law. One surmises that the overwhelming weight of scholarly commentary is correct (see Petition for Certiorari, p. 12), and that Respondent simply has nothing to offer by way of rational analysis, and is perforce driven to repetition as its sole argument.

It seems to Petitioner that a repetition of the arbitrariness which forms an intrinsic part of the 19th Century rule of non-compensability of business goodwill, hardly commends itself as a justification of the excesses which 20th Century urban reality has visited upon the faultless victims of the urban redevelopment bulldozer. And that reality is the crux of Mr. Abrams' Petition for Certiorari, and of his plea for infusion of <u>some</u> fairness and rationality into <u>today's</u> process of of mass urban condemnations. That reality is also the very thing that Respondent ignores.

RESPONDENT'S OSTENSIBLE REFUTATION OF A SUPPOSED DOCTRINE OF "FULL INDEMNIFICATION" IS A STRAW MAN, AS MR. ABRAMS' PETITION IS DIRECTED TO COMPENSABILITY OF A SPECIFIC INTEREST DEFINED AND PROTECTED BY STATE STATUTORY LAW AS PROPERTY, AND NOT TO "ALL LOSSES INCIDENTALLY OR CONSEQUENTIALLY SUSTAINED."

The hoary technique of imputing to one's opponent an argument he never made, raises its head in Respondent's presentation (Resp. at 7). At no time did Mr. Abrams argue for "full indemnification" of "all losses". Throughout this appeal in the courts below, he carefully circumscribed his position as calling for the articulation of a rule that recognizes the moral imperative[1/] of providing some compensation in that class of cases where the owner through no fault of his own finds it impossible to relocate his business destroyed by condemnation. This is

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1/ As the Court told us in <u>United States v. Fuller</u> (1975) 409 U.S. 488, 490, the technical concepts of property law must be tempered by "basic equitable principles of fairness" in structuring compensability rules.

by no means an unprecedented theory; it is used routinely in public utility condemnations, and it has received judicial endorsement in non-utility takings in several states: State v. Saugen (1969, Minn.) 169 N.W.2d 37; Redevelopment Authority etc. v. Lieberman (1975, Pa.) 336 A. 2d 249; City of Lansing v. Wery (1976, Mich.App.) ____ N.W.2d ____ (opinion filed March 24, 1976); State Highway Commission v. L. & L. Concessions (1971, Mich.App.) 187 N.W.2d 465; Bowers v. Fulton County (1966, Ga.) 146 S.E.2d 884, 891.

In the context of Mr. Abrams' actual arguments and developing judicial recognition of the inadequacy of the 19th Century rule (which is exemplified by Mitchell v. United States, 267 U.S. 349[2/])

2/ Mitchell's rationale has not fared well in the market place of ideas; it has been roundly criticized by all legal commentators. See collection in State v. Saugen, supra, 169 N.W.2d at 44, and in State Highway Commn. v. L. & L. Concessions, supra, 187 N.W.2d at 468-469, fn. 11. Mitchell, moreover, is incompatible with this Court's more recent decision in Almota Farmers Elevator etc. v. United States (1973) 409 U.S. 470, where this Court expressly endorsed the theory of (continued)

by numerous state courts [3/], Respondent distorts Mr. Abrams' position when it argues that Mr. Abrams seeks some sort of unbounded "Full Indemnification for All Losses" (Resp. at 7). Respondent's argument betrays a disregard of the issues presented for review, and the history of their presentation to the appellate tribunals in this case.

2/ (continued)
United States v. Certain Property etc. (1968, 2d Cir.) 388 F.2d 596, 598, definitively rejecting the theory that the condemnor need not pay for losses inflicted by the taking on some theory that such losses are an unitended incident of the taking. While Almota dealt with fixture valuation, its legal theory is simply incompatible with Mitchell.

3/ Some jurisdictions provide indirectly for relief to businessmen-condemnees by allowing evidence of the value of their goodwill as it influences the value of the tangible property taken. Housing Authority v. Lustig (1952, Conn.) 90 A.2d 169, 171; City of Trenton v. Lenzner (1954, N.J.) 109 A.2d 409. Others achieve a similar result by allowing the aggrieved condemnee to value his tangible property by capitalizing the income from his business. See State v. Olsen (1975, Mont.) 531 P.2d 1330.

RESPONDENT'S INCREDIBLE DISCUSSION OF SUPPOSED NON-TAXABILITY OF BUSINESS GOODWILL NOT ONLY FLIES IN THE FACE OF FAMILIAR TAX LAW, BUT ALSO UNDERSCORES THE ARBITRARY NATURE OF THE RULE THAT RESPONDENT PURPORTS TO DEFEND.

At first blush, one can scarcely believe one's eyes when reading Respondent's dissertation (Resp. at 5-6) on the supposed non-taxability of business goodwill. A closer reading, however, discloses Respondent's ploy to be a purely semantic one; i.e., goodwill - says Respondent - is not taxable "per se", as if the injection of this latin phrase somehow magically eradicated from consciousness that which every businessman who has dealt with the tax collector knows all too well.

The question is not how business goodwill is taxed, but whether it is taxed. And if goodwill is taxed (whether by the county tax assessor or some other bureaucrat) it perforce must first be recognized as [taxable] property, and it must be valued. What, then, makes goodwill so different and arcane in the context of eminent domain?

Can there be any question that a sale of a business results in taxation of any realized gains? Can there be any question that when a business is devised its value is subject to inheritance taxes? Can there be any question that a gift of a business is subject to gift tax? Indeed, on Respondent's own shaky premise (see Resp. at 6), when a "corporate franchise" is subjected to ad valorem taxation, how can its value be determined for tax purposes if not by consideration of the value of the corporation's goodwill?

Respondent tells the Court (Resp. at 4-5) that under California law an economic interest may be deemed "property" so that the government may tax the owner thereon, and yet not be deemed "property" when the shoe is on the other foot. That is indeed the assertion contained in the California Jonas case relied on by the Respondent (Resp. at 4-5). But is that a logically, morally or Constitutionally defensible rule?

Of course, other state tribunals have taken an entirely different position on this point. The Pennsylvania Supreme

Court, in its noted decision in Gottus v. Redevelopment Authority (1967, Pa.) 229 A. 2d 869, 872, put it thus: ". . . it appears anomalous to us to hold that the machinery of a commercial laundry is realty for tax assessment purposes and not such for eminent domain."

The question thus arises: which of these views comports with the federal constitutional principle? Is it compatible with the notions of due process and equal protection for a state to engage in such a now-you-see-it-now-you-don't game of definitional semantics?

It seems to Mr. Abrams that in light of this Court's language in Great Northern R. Co. v. Weeks (1936) 297 U.S. 135, 139 (see Petition for Certiorari herein, at p. 18, fn. 10), the Pennsylvania view is the correct one, while the California view amounts to an arbitrary denial of equal protection to the aggrieved businessman-condemnee.

There is something inherently and fundamentally shocking about the government taxing an interest with one hand because it is property for purposes of taxation,

while feeling free to destroy it with the other hand because it isn't property for purposes of compensation. [4] That is a legal doctrine more at home in the pages of Kafka's fiction than within the boundaries of American constitutional law.

4/ Contrary to Respondent's misleading assertion (Resp. at 3), business goodwill is deemed property in California for all purposes (as the California Supreme Court expressly recognized in its opinion at bench - see Petition for Certiorari, at A-10, and the case authorities collected there). The inescapable and explicit provisions of California Civil Code §§ 654 and 655, as well as California Business and Professions Code § 14102 leave no doubt of that. Similarly, Respondent's description of the import of goodwill's taxability, (Resp. at 6, fn. 2 and accompanying text) is likewise misleading because it ignores the fact that California Constitution, Art. XIII, §1, defines "property" for purposes of taxation the same way as California Civil Code § 654 defines it generally.

THE CONSTRUCTION OF CALIFORNIA GOVERNMENT CODE § 7262 PRESENTED BY MR. ABRAMS IS THE CONSTRUCTION PLACED UPON IT BY THE CALIFORNIA SUPREME COURT. RESPONDENT IS CONFUSED.

Respondent charges Mr. Abrams (Resp. at 11-12) with "misinterpretation" of Cal. Govt. Code § 7262. The charge is puzzling in light of the California Supreme Court's words in the case at bench, which speak for themselves:

> "The California Relocation Assistance Act, at section 7262 of the Government Code, makes specific provision for the award of statutory compensation in cases of this nature. Subdivision (a) of that section provides: 'As a part of the cost of acquisition of real property for a public use, a public entity shall compensate a displaced person for his: (1) Actual and reasonable expense in moving himself, family, business, or farm operation, including moving personal property. (2) <u>Actual direct losses of tangible personal</u>

> <u>property as a result of moving or discontinuing a business</u> or farm operation, <u>but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property as determined by the public entity.</u> (3) Actual and reasonable expenses in searching for a replacement business or farm."
> 15 Cal.3d at 834-835, 543 P.2d at 920; emphasis the court's.

Respondent is apparently confusing Mr. Abrams' argument directed to compensability of business goodwill (see Petition for Certiorari at 14-24), with Mr. Abrams' challenge to the constitutionality of Cal. Govt. Code § 7262 <u>insofar as it imposes a limitation on recovery of the value of lost personal property based on such personal property's moving costs</u> (see Petition for Certiorari at 25-27).

In his latter point, Mr. Abrams contends that limiting his statutory recovery for the $10,000 worth of prescription medicines to some trifling amount that

the moving of such medicines would cost, is arbitrary (see Petition for Certiorari at 26). That has nothing whatever to do with subdivision (c) of Cal. Govt. Code § 7262.

RESPONDENT'S CONSTRUCTION OF KIMBALL LAUNDRY AMOUNTS TO A SHOCKING DISTORTION OF THE FUNDAMENTAL PRINCIPLES ON WHICH REST BOTH LEGAL AND ETHICAL TENETS OF CONSTITUTIONAL LAW.

Respondent's interpretation of Kimball Laundry (Resp. at 9-11) can only be described as some sort of latter-day social Darwinism, whereby the old and sick can be preyed upon by powerful societal institutions with impunity. To dismiss the victims' economic and personal infirmities and vulnerabilities as somehow their problem that need not be reckoned with by those whose actions impact adversely on those victims, is a notion alien to American constitutional and general jurisprudence, and indeed to the basic ethical tenets of the Judeo-Christian traditions that underlie it.

From the familiar tort notion that the actor takes the plaintiff as he finds him, through the proliferating civil rights cases invoking punctilious constitutional protection on behalf of the poor and the disadvantaged - not because what was done to them was per se wrong, but because what was done impacted harshly upon their peculiar vulnerabilities - the law stands as a monument to the proposition that the powerful may not abuse the weak with impunity simply because they are weak.

Neither in Kimball Laundry, nor anywhere else, did this Court endorse the unconscionable suggestion that the aged and the infirm can be singled out as "fair game".

Moreover, Respondent's assertions concerning Mr. Abrams' supposed ability to start a new business elsewhere (Resp. at 10-11) betray a fundamental misunderstanding of elementary economic principles. When a business is destroyed and the former owner starts a new business elsewhere, he obviously does not recapture any of

his lost value.[5/] Respondent's argument is is thus a complete _non sequitur_.

More importantly, Respondent's argument distorts the ample and undisputed record at bench: _this_ condemnation eliminated the neighborhood from which Mr. Abrams drew his clientele, and scattered that clientele to the four winds. The trial court made a finding that Mr. Abrams' business was taken and destroyed. Respondent's speculations as to what Mr. Abrams might have done if the neighborhood had not been condemned, of if he had been younger, are thus sheer fiction, and an impermissible excursion outside the record.

5/ Just as a tort victim whose automobile is destroyed and who buys a replacement, does not thereby undo the damage he suffered when his original automobile was destroyed.

CONCLUSION

In 1954, when this Court decided _Berman v. Parker_, 348 U.S. 26, a moral I.O.U. was issued to the citizens in the path of urban redevelopment bulldozers. In _Berman_, this Court endorsed a process of mass condemnations serving the pecuniary benefit of private entrepreneurs chosen as the instrument of Congressional redevelopment policy (348 U.S. at 33-34), on the express premise that the Fifth Amendment exacts _just_ compensation as a price of the taking (348 U.S. at 36).

Yet, the implicit promise of _Berman_ remains unfulfilled. _Berman's_ quantum jump, expanding so vastly the power to take and to uproot, ought to be balanced by at least _some_ attention to the development of parameters of just compensation as an equally modern concept, co-extensive

with and balancing that expanded power.6/ Such balancing is long overdue.

It simply isn't fair - in the elemental, constitutional meaning of that word - to vastly expand the scope and incidence of condemnations, to encourage the bulldozing of American cities on an undreamed-of scale in the name of 20th Century progress, and yet restrain the correlative growth of compensation law, and to keep compensation principles shackled to notions rooted in a bygone 19th Century agrarian society, without any regard to the peculiarly 20th Century problems of urban condemnees subject to today's mass takings.

The same recognition of changing social conditions and values, and the same regard for pragmatic experience, extended to some

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6/ And, of course, the function of formulating rules of just compensation is, and always has been, a judicial one: Monongahela Navigation Co. v. United States (1892) 148 U.S. 312, 327; Seaboard Air Line Ry. v. United States (1923) 261 U.S. 299, 304; United States v. New River Collieries (1923) 262 U.S. 341, 343; Baltimore & Ohio R.R. v. United States (1935) 298 U.S. 364, 365.

of the most unworthy members of society7/ deserves extension to the plight of innocent citizens whose only "sin" is that through no fault of their own, their hard-earned property found itself in the path of a redevelopment project.

The undisputed facts at bench serve as a grim reminder of what is being done to American citizens in the name of the law laid down by this Court in Berman. Those citizens need and they deserve a judicial recognition of their plight. They deserve at least to have their cause judged by the constitutional standards developed in the real, post-Berman world.

7/ It is ironic that in Furman v. Georgia (1972) 408 U.S. 238, every member of the Court - whatever his position - recognized that that case was being decided on a historical re-evaluation of the concept of cruel and unusual punishment, in light of changed social conditions and values, as well as empirical experience with imposition of capital punishment. Surely, if those guilty of heinous crimes are entitled to such constitutional reevaluation, should not the same be extended to good citizens as well?

Mr. Abrams prays that his Petition be granted.

Respectfully submitted,

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